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Machine Co. v. Marchant, 11 Utah 68; *State v. King Co.*, Superior Court 9 Wash. 369; *Corban v. Bryant*, 36 Wis. 605. The cases holding contra are: *Sherill v. Wilson*, 29 Ark. 384; *Planters' Bank v. Coulson*, 7 Miss. (6 How.) 395; *Bradley v. Kent*, 22 Cal. 170; *Moore v. Harper*, 42 W. Va. 39; *Davis v. Jones*, 109 Ala. 418; *Pickett v. Smith*, 95 Ga. 757; *Nesbitt v. Dickover*, 22 Ill. App. 140; *Gillette v. Richards*, 46 Ia. 652; *Closen v. Allen*, 29 Minn. 86; *Hedgecock v. Davis*, 64 N. C. 650; *McGary v. Douredore*, 6 Phila. 332; *Clark v. Brown*, 48 Tex. 212; *Wharton v. Thompson*, 17 Tenn. (9 Yerg.) 45.

MASTER AND SERVANT—ASSUMPTION OF RISK—AUTOMATIC COUPLER ACT—CONTRIBUTORY NEGLIGENCE.—An Act of March 2d, 1893, Chap. 196, U. S. Comp. Stat., p. 3174, provides that all cars on interstate trains shall be equipped with automatic couplers, and that if any employe is injured by a car not equipped he shall not be deemed to have assumed the risk thereby occasioned. Plaintiff's intestate, a yardman of the defendants, was instructed to couple a steam shovel car to a caboose. The former was not provided with automatic couplers, had no buffers, and was higher and larger than the ordinary car. To make the coupling, the deceased was obliged to get under the car, and he knew and was so warned by the yard conductor that if he raised his head above the level of the platform, failing to make the coupling, he would be crushed. He miscalculated the height of the platform by an inch or two and was killed. *Held*, (1) the shovel car was a car within the meaning of the statute and (2) the injury was in consequence of the risk which under the statute he had not assumed, and therefore it was error for the state court, in which the case arose, to hold as a matter of law that the deceased was "guilty of contributory negligence, which would defeat any recovery, in lifting his head a little too high after being warned of the danger." JUSTICES BREWER, PECKAM, McKENNA and DAY dissented. *Schlemmer v. Buffalo, Rochester & Pittsburg Railway Co.* (1907), 27 Sup. Ct. Rep. 407.

The two opinions in the case, by Mr. JUSTICE HOLMES for the court, and by Mr. JUSTICE BREWER dissenting, delimit very clearly the principles upon which the doctrine of assumption of risk is deemed to rest, namely, implied contract and contributory negligence. LABATT, MASTER AND SERVANT, §§ 62-67, § 265, Chap. XVIII; *Leary v. Boston & A. R. Co.*, 139 Mass. 580; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Cooms v. N. Bedford Cordage Co.*, 102 Mass. 572; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Ragon v. Toledo, A. A. & N. M. Ry. Co.*, 97 Mich. 265; *Smith v. Baker* (1891), A. C. 325; *West v. S. Ry. Co.*, 85 Fed. 392; *Kane v. N. C. Ry. Co.*, 128 U. S. 91; *Fleming v. St. Paul & D. R. Co.*, 27 Minn. 111. The argument of the court was in substance as follows: By virtue of the statute, Schlemmer had not prejudiced his rights by remaining in defendant's employ after learning of the unlawful coupler, or by going between the rails, as it was necessary to do to make the coupling. The fault, if any on his part, was in his subsequent conduct. But, "the possibility that a railway employe while attempting to make a coupling with a car not equipped with an automatic coupler as required * * * might miscalculate the height to which he might safely raise his head, is so inevitably and clearly attached to the risk which under § 8 of the statute

he does not assume" that the state court by holding the act negligent, sacrificed his rights under the statute "by simply charging him with assumption of the risk under another name." The injury was the direct result of the lack of a proper coupling device. The judgment therefore necessarily involved a federal question, namely, the defense of assumption of risk, and the Federal court had jurisdiction. *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, and the judgment should be reversed. On the other hand it was urged that assumption of risk and contributory negligence are essentially different. *C. O. & G. Ry. Co. v. McDade*, 191 U. S. 64; *Union Pac. Ry. Co. v. O'Brien*, 161 U. S. 451. While the deceased's rights were not prejudiced by remaining in defendant's employ his subsequent conduct might be negligent in different degrees, ranging between a deliberate attempt at suicide to the exercise of the greatest care. The state court decided that the deceased was negligent in the manner in which he made the coupling. This finding of a state court as to a matter of fact is conclusive upon the Federal court. *Christman v. Miller*, 197 U. S. 313; *Bachtel v. Wilson*, 204 U. S. 36, and therefore the Federal court was without jurisdiction in this case. Logically the dissenting justices seem to have a little the better of the argument. It is apparent, however, that the state court was unduly eager to convict the deceased of contributory negligence, and the result reached by the court was a closer approximation to justice.

MASTER AND SERVANT—INDEPENDENT CONTRACTOR.—Where defendants erected an awning over a much frequented street in a populous city and contracted with an awning manufacturer to repair such awning without taking any precautions to protect pedestrians below, and plaintiff while passing under the awning during the progress of the work was injured by the fall of a roller, *held*, that defendants were negligent, rendering them liable for the injuries sustained though the work was performed by an independent contractor. *McHarge et ux. v. M. M. Newcomer & Co.* (1907), — Tenn. —, 100 S. W. Rep. 700.

The question involved is very clearly presented by the learned judge's opinion: "While the general rule of law is as stated, that the proprietor or employer is not liable for the negligence of his contractor and the servants and assistants of the latter, yet there are well established exceptions and limitations to it. These exceptions in general are: where the act contracted to be done is wrongful or tortious in itself; where the injury is the direct or necessary consequence of the work to be done; where the thing to be done or the manner of its execution involves a duty to the public incumbent upon the proprietor or employer; when the work contracted for is intrinsically dangerous and the performance of the contract will probably result in injury to third persons or the public; and where the proprietor interferes with the contractor in the performance of the work." The learned judge includes this case under two of the above exceptions as follows: "We also think that the defendant when he erected the awning assumed all the obligations of the city to the public * * *." And again, "This case also comes under the other exception insisted upon by plaintiffs to the general